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No. 14-857

IN THE
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Defense Industrial Association ("NDIA") is a non-partisan and non-profit organization comprised of more than 1,600 corporations and nearly 90,000 individuals spanning the entire spectrum of the defense industry. NDIA's contractor members provide a wide variety of goods and services that are essential to U.S. national security strategy and military operations. These include, for example, supplying military hardware, providing logistical services for troop support, training foreign military forces, and performing cybersecurity services to protect the nation's vital public and private information. The Department of Defense ("DOD") and other federal agencies responsible for the national defense harness this private-sector innovation for public-sector needs.

NDIA's members thus have a vital interest in the resolution of the Petitioner's third question presented: "Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for

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[1] Pursuant to U.S. Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), and as noted on the case docket by the Clerk, all parties previously have filed letters granting blanket consent to the filing of *amicus curiae* briefs in support of either or of neither party.

government contractors is restricted to claims arising out of property damage caused by public works projects." The NDIA is uniquely qualified to explain why the Ninth Circuit's answer to this question is incorrect. Further, it is especially well positioned to explain the adverse private and public impacts of the Ninth Circuit's overly-narrow construction of *Yearsley*. In addition, NDIA is particularly familiar with the realities of modern federal procurement policy and the corresponding need to update the principles of derivative sovereign immunity as it applies to government contractors.

INTRODUCTION AND SUMMARY OF ARGUMENT

Derivative sovereign immunity reduces to a simple proposition: if the federal government enjoys sovereign immunity from tort suits for its own actions, should not an individual or company performing those same actions at the request or direction of the federal government also have similar protection from liability? *See Yearsley*, 309 U.S. 18 at 21. Over the past century, this Court has applied the doctrine of derivative sovereign immunity, in one form or another, to government employees, private citizens, and contractors performing work on behalf of the government.

Now, more than ever before, the federal government uses private contractors to provide essential goods and services that the government itself lacks the organic capability to produce or perform. Extending derivative sovereign immunity to private contractors serves two important purposes.

First, it protects the government's own sovereign immunity, because otherwise private contractors incurring liabilities during contract performance would pass along those costs to the government, either directly or indirectly. Second, it ensures that private contractors remain willing to perform essential tasks when asked by the government, rather than declining to do so for fear of being held liable to a third party for doing the government's work.

This Court recognized these federal interests in *Yearsley* as well as in subsequent decisions. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (using *Yearsley* and the discretionary function exception of the Federal Tort Claims Act as foundations for the government contractor preemption defense); *Filarsky v. Delia*, 132 S. Ct. 1657, 1658 (2012) (recognizing deleterious effect if private individuals were held personally liable for work performed at the behest of the government).

Yearsley and its progeny construe derivative sovereign immunity broadly, in keeping with the same bedrock principles as sovereign immunity itself. By contrast, the Ninth Circuit's decision in this case, limiting *Yearsley* to public works contracts, would narrow derivative sovereign immunity to near-irrelevance and run counter to the underlying federal interests. Accordingly, for the reasons set forth by Petitioner and the other amici curiae, NDIA supports Petitioner's request for reversal.

NDIA further submits that this case presents an opportunity not only to address the proper

application of *Yearsley*, but also the closely-related government contractor preemption defense set forth in *Boyle* in 1988. Although the three-part *Boyle* test has adequately addressed product defect tort cases, this case provides an opportunity for the court to harmonize the principles in *Boyle* and *Yearsley*, as well as to update this area of the law to reflect the realities of modern procurement practice. The Court should take this opportunity to update and upgrade the test to reflect the changes in the government's procurement methods and to resolve some of the inconsistencies that lower courts have created when applying *Yearsley* and *Boyle*.

Specifically, the NDIA urges this Court to fashion a unifying modernized test that extends the protection of derivative sovereign immunity to contractors where: (1) the government exercised its judgment or discretion during the contracting process; (2) the government accepted the contractor's work with knowledge of any risks or dangers known to the contractor; and (3) the third-party plaintiff now seeks to hold the contractor liable for actions taken within the scope of its contract. This revised test remains true to the principles of *Yearsley* and *Boyle*, is better suited to the government's modern acquisition system, and sets appropriate limits for the protection provided to private contractors.

ARGUMENT

I. Derivative Sovereign Immunity Is Solidly Rooted In American Jurisprudence And Applies To Contractors.

The doctrines of sovereign immunity and derivative sovereign immunity have deep roots in American jurisprudence. This Court long has held that a sovereign government is immune from claims unless it has waived immunity and consented to suit. *See, e.g.*, *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). For nearly as long, the courts have applied derivative sovereign immunity, in one form or another, to government employees, private citizens, and contractors performing work on the government's behalf. *See Filarsky*, 132 S. Ct. at 1658 (describing such protection as anchored in a common law tradition that predates 1871); *Yearsley*, 309 U.S. at 21-22. In each instance, the courts have relied upon similar considerations in extending the government's sovereign immunity to those working on behalf of the government-not only to protect private actors, but also and more importantly to protect the government's interests. In the absence of congressional action, courts have exercised their inherent powers to shape the parameters of these principles. *Howard v. Lyons,* 360 U.S. 593, 596-97 (1959).

A. A Form Of Derivative Sovereign Immunity For Federal Employees

The common law's extension of the sovereign's immunity to federal employees has storied roots. In

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), Judge Learned Hand described the need to protect federal officials acting on behalf of the government in order to protect the government itself:

> [T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 581.

This Court has adopted and expanded upon Judge Hand's thinking. In *Barr v. Matteo*, 360 U.S. 564, 568-69 (1959), the Court extended immunity to federal employees who act within their "line[s] of duty." Then, in *Westfall v. Erwin*, 484 U.S. 292 (1988), the Court held that when the sovereign delegates functions to federal employees exercising discretionary decisionmaking on its behalf, those employees are entitled to the same protections afforded the sovereign with respect to those functions. This entitlement—

> is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity

> rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.

See id. at 295.

B. A Form Of Derivative Sovereign Immunity For Private Citizens Working For The Government

This Court has similarly applied a form of derivative sovereign immunity to private citizens contracted to perform government functions and who acted within their delegated duties. In *Filarsky*, the Court applied derivative sovereign immunity principles to claims against a private attorney retained by the government as a contractor to carry out a government investigatory function. The Court found that private individuals performing government functions should not be left "holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 132 S. Ct. at 1666.

In reaching this conclusion, the Court recounted the history of private citizens receiving derivative sovereign immunity and noted that, even in the mid-nineteenth century, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out

government responsibilities." *Id.* at 1663. Indeed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Id.* at 1665. Protection from third-party lawsuits is needed to avoid "'unwarranted timidity'" by those doing the public's business, and to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *Id.* at 1665-66.

C. A Form Of Derivative Sovereign Immunity For Contractors Working For The Government

In *Yearsley*, this Court similarly applied derivative sovereign immunity to a private contractor performing duties delegated by the government. Essentially, *Yearsley* did for private companies what *Gregoire*, *Barr*, *Westfall*, and *Filarsky* did for government employees and private citizens. The Court later expounded on *Yearsley* in *Boyle* and enunciated the closely-related government contractor preemption defense. Since then, however, lower courts have confused and conflated derivative sovereign immunity and the government contractor preemption defense, resulting in a tangled web of cases in which contractors are sometimes denied the protection intended by *Yearsley* and its progeny.

1. Derivative Sovereign Immunity Under Yearsley And Its Direct Progeny

In *Yearsley*, the plaintiffs claimed that a contractor damaged their property while providing

dredging services on the Missouri River under a contract with the U.S. Army Corps of Engineers, and sought damages under a takings theory. *See* 309 U.S. at 19-21. This Court held that a contractor that works on behalf of the government, within the scope of authority "validly conferred," is not liable for such a loss. *Id.* at 21-22. Rather, the contractor's acts were "act[s] of the government" and thus—unless the government waived its immunity—protected from suit. *Id.* at 22.

Despite the scant precedent at the time, the *Yearsley* Court did not create a new immunity doctrine for contractors from whole cloth. *See* Brief for United States as Amicus Curiae Supporting Respondent, *Yearsley v. W.A. Ross Constr. Co.*, No. 156, 1939 WL 48388, at *21 (1939) ("[T]he paucity of cases directly so holding appears to be attributable to the clarity of the proposition and to the limited number of situations which could give rise to such cases."). Indeed, state courts regularly disposed of suits that alleged takings and torts claims against contractors on public works projects. *See id.* at *32-34. For instance, the Supreme Court of Tennessee assessed a contractor's liability for tort claims arising out of its construction of a dam by looking to the potential liability of the federal government. *See Chattanooga & Tenn. River Power Co. v. Lawson*, 201 S.W. 165, 169 (Tenn. 1918). Similarly, the Supreme Court of Louisiana dismissed a tort suit alleging that a contractor's road work affected the plaintiff's property. *See Connell v. Yazoo & M.V.R. Co.*, 75 So. 652, 655 (La. 1917). And in New York, a plaintiff could not prevail on a takings claim against a contractor based on a dam project; the court

limited the plaintiff's remedies to those set by the statute that authorized the project. *See W. Calking v. S.W. Baldwin*, 4 Wend. 667, 672 (N.Y. Sup. Ct. 1830).

Since *Yearsley*, some lower courts have followed this straightforward application of derivative sovereign immunity to contractors. These courts recognize that a contractor is protected from third-party claims when it has acted pursuant to authority validly conferred by the government and within the scope of its contract. *Yearsley*, 309 U.S. at 20-21. For example, in *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit addressed *Yearsley* and stated:

> This public interest remains intact when the government delegates that function down the chain of command. As a result, courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved. *Imposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work.* As a result, courts have extended derivative immunity to private contractors, "particularly in light of the government's unquestioned need to delegate government functions."

225 F.3d at 466 (emphasis added) (quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996)).

As another example, in *Mangold v. Analytic Services, Inc.*, 77 F.3d at 1445, an Air Force officer and his wife sued a government contractor, alleging it defamed them and inflicted emotional distress by voluntarily cooperating with a government investigation into the officer's activities. As it later did in *Butters*, the Fourth Circuit found that "[e]xtending immunity to private contractors to protect an important government interest is not novel," and that, "no matter how many times or to what level [a government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."[2] *Id.* at 1447-48; *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998) (dismissing tort action against private insurance carrier acting on behalf of United States).

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[2] Similarly, the conduct of individuals and private entities with whom the government contracts has been attributed to the government in other contexts. *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724-25 (1961) (prohibiting racial discrimination by restaurant "operated as an integral part of a public building" and with which the state government had "insinuated itself into a position of interdependence"); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1222, 1226-27 (5th Cir. 1982) (characterizing contractor conduct as "state action" because of the close, symbiotic relationship between the contractor and the government).

Unfortunately, courts have struggled to define the parameters of derivative sovereign immunity as applied to contractors, particularly in light of the Court's *Boyle* decision. This confusion has eroded the protection intended by *Yearsley* and its progeny.

2. Lower Courts Have Erroneously Construed The Government Contractor Preemption Defense To Narrow *Yearsley* And Derivative Sovereign Immunity.

Much of the confusion surrounding derivative sovereign immunity for contractors traces back to *Boyle* and the cases that have applied it. In *Boyle*, the estate of a Marine who had been killed in a helicopter crash sued the manufacturer of the military helicopter. *See* 487 U.S. at 500. The estate alleged that the manufacturer had negligently designed the helicopter's escape hatch, and a jury found against the manufacturer. *See id.* On appeal, the Fourth Circuit reversed and remanded. *See id.* Applying what it characterized as the "military contractor defense"—now commonly known as the "government contractor defense"—the Fourth Circuit concluded that federal common law preempted the defective design claims asserted against the manufacturer.

This Court agreed with the result reached by the Fourth Circuit, but not its analytical framework. The Court first recognized that the lawsuit's subject matter touched upon not one but two areas of uniquely federal interest—"obligations to and rights of the United States under its contracts," and "the

civil liability of federal officials for actions taken in the course of their duty." *Id.* at 505-06. Building upon its prior decision in *Yearsley*, the Court concluded that "the reasons for considering these closely related areas to be of 'uniquely federal' interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts." *Id.*

The Court did not simply follow *Yearsley*, however, when it examined under what circumstances state tort law would conflict with these uniquely federal interests. *See Boyle*, 487 U.S. at 511. Further, although *Boyle* cites *Westfall*, which the Court had decided earlier that same term, the Court in *Boyle* did not use *Westfall* as the underlying rationale for the *Boyle* test. Instead, the Court created a more specific framework for analysis by applying the discretionary function exception contained within the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a).

Specifically, the Court recognized that the government's selection of an appropriate design for military equipment was a discretionary function, involving "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations." *Boyle*, 487 U.S. at 511. That judgment should not be subject to judicial "second-guessing," even when, as contemplated by the FTCA, "the discretion involved be abused." *Id.* The FTCA's discretionary function exception shields the government against potential tort liability for such decisions. *See id.* at 528-29.

The Court concluded that permitting state tort suits against contractors under such circumstances would negate the purpose of the discretionary function exception, because the financial burden of judgments against contractors would be passed along to the government. *See id.* at 531. In other words, it "makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." *Id.* at 512.

To resolve the specific allegations and circumstances of *Boyle*, the Court applied a three-part test to determine whether the claims alleged against the contractor were preempted: First, did the government approve reasonably precise specifications for the design? Second, did the equipment conform to those specifications? Third, did the contractor warn the government about the dangers of using the equipment that were known to the contractor but not to the United States? *See id.* The first two factors ensured that "the suit [was] within the area where the policy of the 'discretionary function' would be frustrated," while the third ensured that no incentive existed for a contractor to withhold information regarding risks of which it had actual knowledge. *Id.* at 512-13.

Since *Boyle*, some courts have used the *Yearsley* and *Boyle* tests interchangeably. For example, in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), the plaintiffs brought tort claims against a logistical support provider that was

operating under a contract to perform waste disposal for the U.S. military in Iraq and Afghanistan. The Fourth Circuit examined whether the defendant was entitled to assert *Yearsley* derivative sovereign immunity. The court began with the proper inquiry under *Yearsley*-whether the contractor was acting within its authority under a valid contract or had exceeded "the scope of its employment." *Id.* at 343 (citing *Butters*, 225 F.3d at 466). But then the court took a wrong turn by borrowing the second prong from *Boyle*-whether the contractor complied with the government's precise "instructions"-and grafting that onto the *Yearsley* test. *See id.* at 345. Neither *Yearsley* nor any of its progeny endorsed this hybrid approach.

The Sixth Circuit recently expressed similar confusion in *Adkisson v. Jacobs Engineering Group*, No. 14-6207, __ F.3d ___, 2015 WL 3463032, at *4 (6th Cir. June 2, 2015). In *Adkisson*, the Sixth Circuit considered whether an engineering company engaged by the Tennessee Valley Authority to provide remediation work could assert derivative sovereign immunity as a defense to third-party personal injury claims. Citing *Yearsley* and *Boyle*, the court stated: "If *Yearsley* really does stretch as broadly as its language suggests, the Supreme Court in *Boyle* would presumably not have invented a new test to govern the liability of military procurement contractors; it could have simply cited *Yearsley* and called it a day." *Id.* at *4. Because the plaintiffs in *Adkisson* conceded *Yearsley*'s applicability, however,

the Sixth Circuit did not have to reach these "thorny questions." *Id.*[3]

The confusion about *Yearsley*, *Boyle*, and their relationship with one another has been compounded by the transformation of federal contracting over the past three decades. Set against the realities of the modern acquisition system, courts struggle to differentiate between and apply *Yearsley* and *Boyle*.

II. Modern Acquisition Practice Renders the Foundational Case Law Outdated And In Need Of Refinement.

Government procurement has metamorphosed in the nearly thirty years since *Boyle*. The modern era is characterized by three trends in particular: (A) an increasing reliance on contractors to perform a larger and more diverse variety of functions, especially services; (B) the use of "umbrella" contracts of indefinite duration and performance requirements that maximize contractor flexibility and efficiency; and (C) a preference for performance-

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[3] The Sixth Circuit ultimately concluded that derivative sovereign immunity was an affirmative defense and remanded the case for the district court to consider whether the contractor was eligible for *Yearsley* immunity and determine whether the contractor's conduct was of the type that the FTCA's discretionary function exception was designed to shield. *Adkisson*, 2015 WL 3463032 at *7. The defendant has expressed its intention to file a petition for certiorari, and the Sixth Circuit has stayed issuance of the mandate pending resolution of that petition. *See* Order to Stay Mandate, *Adkisson v. Jacobs Engineering*, No. 14-6207 (6th Cir. Jul. 15, 2015).

based acquisitions over specification-based contracts. As the government delegates more and more responsibility to its contractors, the need continues to grow for the Court to clarify *Yearsley* derivative sovereign immunity and update the *Boyle* government contractor preemption defense.

A. Services Contracts

More than ever before, the government relies on private contractors to provide all manner of goods and services. In fiscal year 2014, the government spent $447.6 billion on contracts.[4] Services contracts, in particular, have been on the rise,[5] and contractors now frequently provide mission-critical services that, in the *Boyle* era, would have been performed by government personnel.[6]

DOD has led the way in its reliance on contractor-provided services, more than doubling its services-acquisition spending between fiscal years

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[4] *See* Bloomberg Government, BGOV200 Federal Industry Leaders 2015 (June 8, 2015), *available at* http://about.bgov.com/nextedge/report/bgov-200/.

[5] *See* Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress at 2-3 (Jan. 2007) ("AAP Report"), *available at* http://www.ndia.org/Advocacy/AcquisitionReformInitiative/Documents/4-24102_GSA.pdf.

[6] *See* U.S. Gov't Accountability Office, GAO-08-160, Federal Acquisition: Oversight Plan Needed to Help Implement Acquisition Advisory Panel Recommendations 1, 15 (2007), *available at* http://www.gao.gov/assets/280/270729.pdf.

2000 and 2012.[7] Contractors support nearly every aspect of DOD's mission and have been vital to military operations in Iraq and Afghanistan,[8] comprising 50 percent or more of the total military force in those theaters.[9]

DOD now engages contractors to provide a range of services that it insourced to enlisted personnel in the past.[10] Contractors perform intelligence analysis, security services, and engineering and technical support, as well as critical logistical support such as custodial, dining, and laundry services.[11] For example, through its Logistics Civil Augmentation Program—known as "LOGCAP"—the Army has depended on private

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[7] U.S. Gov't Accountability Office, GAO-13-634, Defense Acquisitions: Goals and Associated Metrics Needed to Assess Progress in Improving Service Acquisition 1 (2013) (after adjustment for inflation), *available at* http://www.gao.gov/assets/660/655605.pdf.

[8] *See id.*; Moshe Schwartz & Jennifer Church, Cong. Research Serv., R43074, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress*, at 1-4 (2013).

[9] *See* Schwartz & Church (Summary).

[10] *See* Defense Science Board Task Force, Improvements to Services Contracting 31 (Mar. 2011), *available at* http://www.acq.osd.mil/dsb/reports/ADA550491.pdf.

[11] *See* U.S. Gov't Accountability Office, GAO-08-621T, Defense Acquisitions: DOD's Increased Reliance on Service Contractors Exacerbates Long-Standing Challenges 1, 3 (Apr. 3, 2008) (Statement of David M. Walker, Comptroller General of the United States, in Testimony Before the House Subcomm. on Def., Comm. on Appropriations), *available at* http://www.gao.gov/assets/120/119530.pdf.

contractors "to provide full-spectrum logistics and base support services" around the world for the past three decades.[12] Between 2001 and 2009, the LOGCAP III contract in Iraq and Afghanistan totaled more than $36 billion of work.[13]

It is not only DOD that now relies on contractors for mission-critical services. Following the military's withdrawal from Iraq, the State Department has used contractors to train Iraqi police, detect enemy rockets and roadside bombs, operate reconnaissance drones, pilot helicopters, and serve as first-responders for civilians.[14] The U.S. Agency for International Development ("USAID") also depends on contractors for its development projects worldwide, including in high-risk and war-torn areas. Between fiscal years 2002 and 2013, for example, the State Department and USAID together spent approximately $26 billion on contracts to be performed in Iraq and Afghanistan.[15]

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[12] *Logistics Civil Augmentation Program*, Army Reg. 700-137, § 3-3(a) (Dec. 28, 2012).

[13] *See* Doug Brooks & Fiona Mangan, *Modern Use of Contractors in Peace & Stability Operations*, 18 Brown J. World Aff. 181, 184 (2011).

[14] *See* Michael R. Gordon, *Civilians to Take U.S. Lead as Military Leaves Iraq*, N.Y. Times, Aug. 19, 2010, at A1.

[15] U.S. Gov't Accountability Office, GAO-14-229, Contingency Contracting: State and USAID Made Progress Assessing and Implementing Changes, but Further Actions Needed 1 (2014), *available at* http://www.gao.gov/assets/670/660956.pdf.

B. Umbrella Contracts

In conjunction with its increasing use of contractors, the government has fostered flexibility and efficiency through umbrella "indefinite-delivery, indefinite-quantity" ("IDIQ") contracts,[16] in which contractors provide an unspecified quantity of goods or services—subject to stated minima and maxima—during a set timeframe. 48 C.F.R. § 16.504(a). IDIQ procurements require contractors to serve as flexible partners with their government customers, adjusting to changing and unpredictable needs. In fact, the utility of IDIQ contracts is precisely their lack of rigid requirements and specifications.[17]

C. Performance-Based Acquisitions

Finally, "performance-based acquisition" ("PBA") has emerged as a new, preferred acquisition method, "structured around the results to be achieved as opposed to the manner by which the work is to be performed." 48 C.F.R. § 2.101. PBA heralds a conscious redirection away from traditional services-acquisition methods.[18] Of course, in many procurements, particularly major weapon systems, the government continues to exercise ongoing and detailed control through constant review and

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[16] AAP Report at 3, 67.

[17] *See id.* at 67.

[18] U.S. Gov't Accountability Office, GAO-03-281, Acquisition Management: Agencies Can Improve Training on New Initiatives 10 (2003) ("New Initiatives Report"), *available at* http://www.gao.gov/new.items/d03281.pdf.

approval of the contractor's activities. In PBA procurements, by contrast, contractors are evaluated and paid based on their achievement of specified end goals, not their ability to check boxes along the way.[19]

The government's commitment to PBA is strong. The Office of Federal Procurement Policy introduced PBA as the preferred method for services acquisitions in 1991, and Congress legislatively enacted that preference in 2000. *See* National Defense Authorization Act, Pub. L. No. 106-398, 114 Stat. 1654 (2000). The Federal Acquisition Regulation implements this PBA preference and requires agencies to use PBA "methods to the maximum extent practicable." 48 C.F.R. § 37.102(a), (a)(1). Agencies have kept pace with the PBA initiative and significantly increased their use of PBA vehicles, even exceeding goals set by the Office of Management and Budget.[20]

To be clear, the federal government continues to exercise significant judgment and discretion in its procurement activities. But, particularly in the acquisition of services, the new federal procurement paradigm in many instances has replaced detailed specifications with performance-based directions;

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[19] *See* AAP Report at 171.

[20] *See, e.g.*, U.S. Gov't Accountability Office, GAO-14-819, USDA Contracting: Further Actions Needed to Strengthen Oversight of Contracts for Professional Services 12, 22 (Sept. 2014), *available at* http://www/gao/gov/assets/670/666216.pdf; AAP Report at 172–73.

concrete requirements with IDIQ contracts and more generalized statements of work; and arms-length transactions with contracting "partnerships." These new methodologies all maximize the government's contracting flexibility and discretion while taking advantage of contractors' experience and expertise. In short, these modern trends have resulted in a more fluid, less defined procurement process-but one no less defined by the government's exercise of discretion in its procurement decisions.[21]

III. The Court Should Clarify The Parameters Of Derivative Sovereign Immunity Both To Fulfill The Doctrine's Original Purposes And Meet The Realities Of The Modern Acquisition System.

The Ninth Circuit's overly-narrow construction of *Yearsley* presents an opportunity for this Court to resolve the confusion and inconsistencies that have resulted from the lower courts' *ad hoc* approach to derivative sovereign immunity. The Court can weave a unifying principle for the doctrine based on the well-established, well-reasoned threads within the foundational case law. The Court also can clarify the doctrine's relationship with *Boyle's* government contractor preemption defense. Perhaps most importantly, the Court can ensure that the test for derivative sovereign immunity is suited to the government's modern acquisition approach.

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[21] *See* New Initiatives Report at 1.

A. The Broad Policies Underlying The Doctrine Of Derivative Sovereign Immunity Require Rejection Of The Ninth Circuit's Narrow Construction Of *Yearsley*.

In the opinion below, the Ninth Circuit misconstrued this Court's decision in *Yearsley* as "establish[ing] a narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a. This holding-that *Yearsley* applies only to public works projects-is unsupported by *Yearsley* and its progeny, as well as this Court's similar case law extending immunity to individuals acting on behalf of the government. Indeed, all of the foundational case law in this area shares a common rationale: to protect the government's interests by protecting individuals and contractors who act on the government's behalf. Limiting derivative sovereign immunity to the narrow area of public works projects runs contrary to this purpose.

This Court in *Yearsley* broadly stated that "no liability on the part of the contractor for executing [Congress'] will" can exist if "authority to carry out [the] project was validly conferred." *Yearsley*, 309 U.S. at 20-21. Rather, the contractor's acts are considered "act[s] of the government," at least for the purposes of extending governmental immunity. *Id.* at 22. Although *Yearsley* arose in the context of a service contract for a public works project, nothing in the case suggests that derivative sovereign immunity is limited to such projects. Nor did this Court make that distinction when discussing *Yearsley* in *Boyle*;

the Court broadly referred to the contract in *Yearsley* as a "performance contract," nor simply a public works contract. *See Boyle*, 487 U.S. at 506.

The Fourth Circuit in both *Mangold* and *Butters* applied *Yearsley* outside the sphere of public works projects. In doing so, the court focused on the government's need to contract out certain functions: "no matter how many times or to what level [a government] function is delegated, it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold*, 77 F.3d at 1447-48. Further, "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466. This sound reasoning demands a broad grant of derivative sovereign immunity, not the unduly-restrictive one used by the Ninth Circuit. [22]

A broad grant of derivative sovereign immunity to contractors would also be in line with how this Court has extended immunity to government employees and private individuals. The

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[22] The Ninth Circuit also concluded that *Boyle*'s government contractor preemption defense was "inapposite" because the plaintiff's claim here was based on federal law, not state law. Pet. App. 18a. The Court's decision in *Boyle* suggests otherwise. *See* 487 U.S. at 512 n.5 (describing as "not necessarily correct" the dissent's view that the result would be different if the claim had been based on a federal statute and not state tort law, but leaving that issue for another day).

government has a similar interest in insulating the performance of its functions, whether it delegates that work to a contractor, a government employee, or a private individual. In all such cases, the government needs to ensure that "talented individuals" with "specialized knowledge or expertise" are willing to accept public engagements. *See Filarsky*, 132 S. Ct. at 1665-66. "[E]ffective government will be promoted" if those officials, private individuals, and contractors "are freed of the costs of vexatious and often frivolous damages suits." *Westfall*, 484 U.S. at 295. Contractors and individuals working alongside government employees, who act within the scope of their contract authority to carry out important public functions, should not "be left holding the bag-facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *See Filarsky*, 132 S. Ct. at 1666.

Finally, the modern era of government procurement demands a broad approach to derivative sovereign immunity for a wide range of contracted activities. It makes no sense to immunize a contractor providing civil engineering services for the building of roads, but not software engineering services for the government's technology on the information superhighway. Likewise, there is no reason that a contractor providing security or logistical support services to the government should not have some version of the protection that a federal employee providing the same services would have. The test proposed below provides that protection, while at the same time accounting for the inherent differences between federal employees and for-profit

corporations engaged to perform work subject to extensive federal procurement regulations and requirements and the ultimate oversight of the government.

B. The Court Should Resolve The Confusion Created By Post-*Boyle* Jurisprudence And Clarify The Relationship Between Derivative Sovereign Immunity And The Government Contractor Preemption Defense.

The lower courts' diverging views of *Yearsley* and *Boyle* have created significant uncertainty for government contractors. Further, the fundamental changes in the federal procurement system in the decades since *Boyle*, described *supra*, require a restatement and revision of derivative sovereign immunity and the government contractor preemption defense.

NDIA does not suggest that the Court address and resolve all of the outstanding issues that have arisen since *Yearsley* and *Boyle*. However, the case at hand provides a prime opportunity to articulate a clearer standard for the application of derivative sovereign immunity to federal contractors and set forth a unifying principle to guide lower courts By doing so, the Court will help clarify and resolve:

Whether Boyle Extends to Service Contracts? Some courts have limited *Boyle* to contracts for products and excluded contracts for services. *Compare In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 811 (9th Cir. 1992) *with Hudgens v. Bell*

Helicopters/Textron, 328 F.3d 1329, 1333-34 (11th Cir. 2003); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120-21 (3d Cir. 1993). *See also Adkisson*, 2015 WL 3463032, at *4 (noting the "thorny questions" that existed regarding the proper scope of *Boyle's* application in a case involving engineering services). The Court should make clear that *Boyle's* protection extends to both product and service contracts.

Whether Boyle Extends to Civilian Contracts? Despite strong arguments to the contrary, not all courts have concluded that the *Boyle* government contractor preemption defense extends to civilian contracts. *Compare Carley*, 991 F.2d at 1124, *with In re Hawaii Federal Asbestos Cases*, 960 F.2d at 811. The Court should clarify that *Boyle* applies to both military and civilian contracts.

How Does Boyle Apply to Failure to Warn Claims? Boyle did not discuss inadequate warning claims. The circuits are split as to whether a contractor must show merely that the government exercised some discretion over the warnings to be included, or that the government affirmatively prescribed warnings to be given or proscribed additional warnings. *Compare Tate v. Boeing Helicopters*, 55 F.3d 1150, 1152 (6th Cir. 1995), *with Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487, 1490 (11th Cir. 1990).

What Degree of Government Oversight or Review Is Required to Trigger Boyle? Perhaps most importantly, courts have failed to agree on the degree of government involvement, review, and approval that is necessary to satisfy the first element

of the *Boyle* test. *Compare Stout v. Borg-Warner Corp.*, 933 F.2d 331, 333-34 (5th Cir. 1991) (approval of overall design is sufficient), *with Bailey v. McDonnell Douglass Corp.*, 989 F.2d 794, 799 (5th Cir. 1993) (requiring review and approval of particular design feature at issue).

C. The Court Should Extend Derivative Sovereign Immunity To Government Contractors For Actions Within The Scope Of Their Contracts If The Government Exercised Judgment Or Discretion During The Contracting Process And If It Knowingly Accepted The Contractor's Work.

In addressing the current confusion, the Court should look to two overriding principles set forth in *Yearsley*, *Boyle*, *Filarsky*, and federal jurisprudence generally. First, the government's sovereign immunity must be protected, not only when exercised directly, but also indirectly through the government's use of private contractors to provide goods and services that the government does not, or cannot, obtain from its own resources.

Second, contractors engaged by the federal government to provide their experience and expertise should be protected when they exercise that expertise and judgment in a manner that is acceptable to the government. Otherwise, contractors' fear that they might be left "holding the bag" and liable to third parties for work that the government had deemed acceptable might deter

contractors from providing the goods and services that the government requires.

Keeping these bedrock principles in mind, NDIA suggests that the Court revise and update the test to determine whether a private contractor is protected from liability for the government work it performs. The new test would consist of three elements:

- Did the federal government exercise judgment or discretion through its use of the contractor to provide products or services?

- Did the federal government accept the goods or services provided by the contractor with knowledge of any risks, dangers, or nonconformities of which the contractor had actual knowledge?

- Does the third-party plaintiff seek to hold the contractor liable for work or conduct performed within the scope of the contract?[23]

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[23] The Court may question whether contractors should also have to demonstrate they were acting in a traditional agency capacity on behalf of the government in order to qualify for derivative sovereign immunity. The Fifth Circuit has rejected such a requirement, *see Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 210 (5th Cir. 2009), but courts continue to grapple with the issue. *See, e.g.*, *Adkisson*, 2015 WL 3483032, at *6; *In re KBR, Inc.*, 744 F.3d at 334; *Butters*, 225 F.3d at 466; *Mangold*, 77 F.3d at 1448. NDIA believes that such a showing is not necessary so long as the government has clearly delegated a function in a valid contract.

If all three conditions are satisfied, then the principles of derivative sovereign immunity and preemption as articulated in *Yearsley* and *Boyle* require dismissal of the claims against the contractor.

The proposed test uses a balanced approach to extend the protections of *Yearsley* derivative sovereign immunity to private contractors performing government work. At the same time, it accommodates the inherent differences between federal employees and private entities, as this Court implicitly recognized when it formulated the *Boyle* test. Each element of the proposed test reflects that balanced approach.

1. Did The Federal Government Exercise Judgment Or Discretion During The Contracting Process?

For the first element, a court should consider whether the federal government exercised judgment or discretion through its use of a contractor to provide the goods or services at issue. This requirement confirms the existence of a uniquely federal interest that, if other conditions are met, may conflict with third-party claims against the contractor.

A contractor may meet its burden to show this element in several ways. For example, government discretion may be established through the initial "request for proposals" that the government issues; the contractor selection process; the government contract and individual task orders issued to the contractor; statements of work issued by the

government; oversight, supervision, or review during contract implementation and performance; or other documentary, or testimonial evidence that the government exercised its discretion and judgment in the balancing of government needs, resource constraints, government priorities, and other considerations.

Importantly, this element should not require a contractor to demonstrate that the government controlled every aspect of contractor performance through the review and approval of detailed specifications. Such a requirement is inconsistent with modern acquisition practice. Rather, a court should review the submissions of the parties to determine whether, as a whole, they demonstrate that the government used discretion or judgment during the contracting process. *Boyle* directs that the government's exercise of such discretion should be immune not only from direct challenges but also from collateral attack via third-party lawsuits against the government's contractors. *See* 487 U.S. at 512.

2. Did The Federal Government Accept The Goods Or Services Provided By The Contractor With Knowledge Of Any Risks, Dangers, Or Hazards Of Which The Contractor Had Actual Knowledge?

The second element is whether evidence exists that the government accepted the goods or services required by the contract. Indicia of acceptance may be formal, such as through the government's

issuance of a "Material Inspection and Receiving Report," also known as a DD250 Form, for goods or services provided by the contractor. A contractor also may present other evidence of government acceptance, such as payment of the contractor's invoices; progress billings and final payment; favorable performance evaluations; payment of award fees or other bonuses; or other contract performance documents. In addition, evidence of long-term use by the government also would tend to indicate acceptance. *See, e.g.*, *Smith v. Xerox Corp.*, 866 F.2d 135, 138-39 (5th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986).

Requiring indicia of acceptance ensures that the government has exercised judgment and oversight not only during contractor selection and contract performance, but also after the contractor has performed its work, essentially bookending the contractor's performance with discretionary government decision-making.

Government acceptance must be made "knowingly"-i.e., with notice from the contractor, or independent awareness, of any risks, dangers, or hazards of which the contractor itself has actual knowledge. This condition negates the potential incentive, discussed in *Boyle*, for a contractor to withhold knowledge of risks and "cut[] off information highly relevant to the discretionary decision" of the government. 487 U.S. at 513.

3. Is The Third-Party Plaintiff Seeking To Hold The Contractor Liable For Work Or Conduct Performed Within The Scope Of The Contract?

The final element requires a contractor to demonstrate that a third-party claim raised against it relates to work or conduct that falls within the scope of the government contract. This requirement ensures that any protection afforded by derivative sovereign immunity principles or the government contractor defense is properly tailored to work actually contemplated, authorized, and accepted by the federal government in furtherance of government objectives. Allowing a claim to proceed against a contractor that acts within the parameters of its contract runs a significant risk of conflicting with the government's exercise of discretion to engage the contractor and delegate such work.

Allegations that a contractor acted negligently or breached the terms of its government contract are not sufficient to show that a contractor acted outside the scope or beyond the parameters of its contract. To hold otherwise would eviscerate the protection of derivative sovereign immunity. The Solicitor General made a similar observation in an *amicus curiae* brief that it recently filed with the Court. *See* Brief for United States as Amicus Curiae, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817, 2014 WL 7185602, at *16 (U.S. Dec. 16, 2014).

Harris involved the purposes underlying the FTCA's combatant activities exception and the

extent to which they applied to private contractors. At the request of the Court, the United States opined that claims arising against a private contractor should be preempted if similar claims against the United States would fall within the combatant activities exception and if the contractor was acting within the scope of its contractual relationship. *See id.* at *4-5. The United States noted that:

> [F]ederal preemption would generally apply *even if an employee of a contractor allegedly violated the terms of the contract or took steps not specifically called for in the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government*. Determination of the appropriate recourse for the contractor's failure to adhere to contract terms and related directives under its exclusively federal relationship with the United States would be the responsibility of the United States, through contractual, criminal, or other remedies-not private state-law suits by individual service members or contractor employees.

Id. at *15-16 (emphasis added). The same rationale applies in cases involving derivative sovereign immunity.

4. The Modernized Test Fulfills The Purposes Of The Foundational Case Law While Accommodating The Changed Federal Acquisition Process.

This modernized construction of derivative sovereign immunity and federal preemption achieves a number of important objectives while remaining consistent with existing jurisprudence.

First, the revised test protects the federal government's sovereign immunity while acknowledging modern procurement realities. The government's discretion in its procurement efforts today is just as pervasive as in the past, although exercised in a different way. The federal interest in protecting that discretion from direct or indirect attack—a touchstone of *Boyle*—remains. The revised test reflects that unique federal interest by requiring a contractor to show that the government exercised its discretion during the contracting process as well as in the government's ultimate acceptance of the work performed.

Second, the updated test encourages contractors to exercise their expertise and best judgment when providing acceptable goods and services to the government. Contractors that do so will be protected from liability so long as they act within the scope of their contract.

Third, the updated test's acceptance element provides a safeguard, similar to the third requirement of *Boyle*, to ensure that contractors disclose risks or hazards known to the contractor but

unknown to the government. As noted by the Court in *Boyle*, this requirement ensures that contractors have no incentive to conceal dangers or risks from the government in an effort to avoid liability to third parties.

Fourth, while safeguarding these basic principles, the revised test eliminates the outdated concept from *Boyle* that the government must have provided input on each discrete decision or action by the contractor. Instead, the protection exists so long as the contractor was acting within the parameters of work set forth by the government. The contractual provisions, statements of work, and other governmental directions define the scope within which a contractor may act in the performance of the government's requirements. A contractor exceeds its authority only when it acts outside that scope.

Fifth, this upgraded test also dispenses with the artificial distinctions that lower courts have raised between contracts for products and contracts for services; between design and construction contracts; between military and civilian government contracts; between the government's prescription and proscription of warnings, etc.

Finally, the revised test ensures that the protection extended to contractors performing work for the United States is consistent with the immunity accorded to the United States itself. Just as the government's exercise of discretion is protected even when that discretion is allegedly abused or negligently applied, the contractor's

performance is protected, even if allegedly deficient in some way.

In short, the revised test proposed by NDIA accommodates modern acquisition policy and resolves jurisprudential inconsistencies. Most importantly, the test ensures that the unique federal interests identified in *Boyle* remain protected, both directly and indirectly, and the federal government receives from its contractors their best expertise and judgment.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petitioner's brief and the briefs of the other *amici curiae* supporting the Petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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